and not only given a liferent provision to her, but also his land-estate to the children of the marriage; and therefore craved the Lords would declare her right of succession after her father's death.

ANSWERED,---This was a preposterous action as well as unnatural; seeing an heir cannot pursue *vivente patre*, and no action should be sustained at their instance till after their father's death; and these clauses are no more but destinations of succession; and the father being still fiar, he may do any rational deeds notwithstanding of such provisions; as has oft been found, and particularly Dirleton records one, *7th January* 1675, *Innes against Innes;* that where an eldest son of a first marriage had served inhibition on such a contract, and raised reduction thereon, the Lords would not sustain process, because the father was living, and the son neither was nor could be heir while he was alive; but this last reason will not hold where the clause is conceived in favours of the bairns of the marriage.

Some Lords thought the pursuit might be sustained *declaratoria juris*, not to have effect or execution during the father's life; and that he could do no voluntary gratuitous or fraudulent deed in prejudice of the clause in the first contract. Others remembered Craig's case of the three Aikmans, sisters, and that the parental power is not to be infringed. Therefore it was ordained to be heard in presence.

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1697. *July* 7. HAMILTON of KINKELL *against* AYTON of KINALDIE.

HAMILTON of Kinkell pursues Ayton of Kinaldie for reducing an old disposition of some lands made by his predecessor on death-bed. Kinaldie's defence was, He and his authors had possessed forty years without interruption.

Kinkell ANSWERED,---He stood intercommuned in the late Government, for opposing Episcopacy, from 1675 till 1689, when it was removed, and so that time must be deducted from the prescription, *quia contra non valentem agere non currit.*

REPLIED,---That brocard takes only place where one *non valet agere ob defectum tituli;* as if he be forfeited, but not *ob impedimentum facti*, on an accidental occasion, or such a personal impediment as a citation for conventicles, and in regard of his contumacy, that letters of intercommuning were served against him; for that did not divest him of the right. See *25th January* 1678, *Earl of Lauderdale* against *Tweeddale.*

DUPLIED,---As he durst not appear all that time, either to pursue or defend, so neither might he constitute an assignee; for none durst converse with him, or receive a right from him.

The Lords did not determine if this intercommuning was a sufficient interruption; but, before answer, ordained him to condescend and instruct how long it lasted.

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